APPENDIX A

296 F.3d 671
(Cite as: 296 F.3d 671)

United States Court of Appeals,
Eighth Circuit.

UNION PACIFIC RAILROAD COMPANY, Appellant,

v.

KIRBY INLAND MARINE, INC. OF MISSISSIPPI,
a/k/a/ Brent Transportation Company,
in personam and the M/V Miss Dixie,
its engines, tackle, fixtures and
appurtenances, etc., in rem, Appellees.

No. 01-3334.

Submitted: May 13, 2002.
Filed: July 11, 2002.
Rehearing and Rehearing En Banc Denied:
Aug. 15, 2002.

Before BOWMAN, BYE, Circuit Judges, and NANGLE,[1] Senior District Judge.

NANGLE, Senior District Judge. Appellant Union Pacific Railroad Company appeals from the district court's conclusions of law and final judgment in the instant case. For the reasons discussed below, we reverse in part and affirm in part the district court's opinion.

---

[1] The HONORABLE JOHN F. NANGLE, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

I. Background

A. Background Facts

The parties stipulated to the following underlying facts. The Clinton Railroad Bridge (the "Clinton Bridge"), was constructed in 1907. Pursuant to 33 U.S.C. § 401, the construction of the Clinton Bridge was authorized by and constructed in accordance with permits issued by the United States Coast Guard. Appellant is the owner and operator of the Clinton Bridge.

Kirby Inland Marine, Inc. ("Kirby") is the owner and operator of the M/V MISS DIXIE, a river barge towboat in operation on the Mississippi River. On May 5, 1996, the M/V MISS DIXIE and/or its tow allided with the Clinton Bridge causing damage to the bridge and the M/V MISS DIXIE. On October 10, 1999, Appellant filed the instant action alleging the damage to its bridge was caused by the negligence of the crew of the M/V MISS DIXIE and/or by the unseaworthiness of that vessel. Appellees denied that the crew was negligent or that the vessel was unseaworthy and asserted that Appellant itself was negligent in the construction, design, care and maintenance of the Clinton Bridge.

To prove Appellant's negligence, Appellees proffered a Coast Guard's Order to Alter, issued on February 28, 1996, which found that the Clinton Bridge was "an unreasonable obstruction to navigation." The Order to Alter was issued pursuant to the Truman-Hobbs Act, 33 U.S.C. §§ 511-524, which authorizes the United States Coast Guard to investigate whether a bridge is unreasonably obstructing navigation and to order a bridge owner to alter a bridge which does indeed unreasonably obstruct navigation.

The parties entered into a settlement agreement; however, the agreement was predicated on the district court deciding one specific legal issue: "Does the Truman-Hobbs

Act finding that the bridge is 'an unreasonable obstruction to navigation' render inapplicable any presumption that negligence of the barge crew was the cause of an allision between a moving vessel and a stationary bridge." *Union Pac. R.R. Co. v. Kirby Inland Marine et al.*, No. 3-99-CV-80185, slip op. at 1, 2001 WL 1689710 (S.D.Iowa Aug. 13, 2001) The presumption in question is the longstanding *Oregon* rule which raises a presumption that a vessel's crew was negligent when a vessel strikes a stationary object such as a bridge. *The Oregon*, 158 U.S. 186, 197, 15 S.Ct. 804, 39 L.Ed. 943 (1895). Under the parties' settlement agreement, if the district court concluded that the *Oregon* rule does apply, then Kirby would pay an agreed amount; alternatively, if the district court concluded that the *Oregon* rule does not apply, then Kirby would pay a *674 smaller agreed amount. Thus, the primary issue before the district court was whether the Coast Guard's Order to Alter trumps the *Oregon* rule.

B. District Court's decision

Although the district court initially stated that the *Oregon* rule should apply, the district court eliminated the presumption by invoking the *Pennsylvania* rule which is another longstanding admiralty principle. Under the *Pennsylvania* rule, "[w]here any party violates a statutory or regulatory rule designed to prevent collisions, that party has committed per se negligence . . . and [that party] has the burden of proving that its statutory fault was not a contributing cause of the accident." *Union Pac. R.R. Co. v. Kirby Inland Marine et. al*, No. 3-99-CV-80185, slip op. at 3, 2001 WL 1689710 (S.D.Iowa Aug. 13, 2001) (citing *The Pennsylvania*, 19 Wall. 125, 86 U.S. 125, 136, 22 L.Ed. 148 (1873)). The district court concluded that Appellant violated 33 U.S.C. § 512 of the Truman-Hobbs Act which states that "No bridge shall at any time unreasonably obstruct the free

navigation of any navigable waters of the United States." 33 U.S.C. § 512. The district court found that a violation of § 512 is sufficient to invoke the *Pennsylvania* rule and thus "the normal presumption of fault that attaches to the vessel under the *Oregon* rule is shifted back to the structure owner under the *Pennsylvania* rule." *Union Pac.*, at *3.

The district court also concluded that the Coast Guard's Order to Alter was admissible pursuant to Federal Rules of Evidence 402 and 803(8)(C). *Id.* at 4. Appellant filed a timely notice of appeal and now asserts that the district court erred by concluding that: (1) the *Oregon* rule does not apply to the instant case, and (2) the Order to Alter is admissible.

II. Discussion

A. The *Oregon* Rule

We will first consider whether the district court erred by invoking the *Pennsylvania* rule to trump the *Oregon* rule and shift the burden of persuasion back to Appellant. We review the district court's conclusions of law de novo. *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir.2002) (citing *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir.2001)).

[1][2] For the *Pennsylvania* rule to apply, three elements must exist: (1) proof by a preponderance of the evidence of violation of a statute or regulation that imposes a *mandatory duty;* (2) the statute or regulation must involve *marine safety* or navigation; and (3) the injury suffered must be of a nature that the statute or regulation was intended to prevent. *Folkstone Mar. Ltd. v. CSX Corp.*, 64 F.3d 1037, 1047 (7th Cir.1995) (emphasis added). The Truman-Hobbs Act does not satisfy the prerequisites of the *Pennsylvania* rule because it was not drafted: (1) to maintain marine safety; (2) to impose a specific duty; or (3) to prevent a specific sort of injury.

We find that the Truman-Hobbs Act is a funding statute and not a safety statute. Congress stated that it drafted the Truman-Hobbs Act "to provide an orderly method for the just apportionment of the cost of the reconstruction or alteration of bridges over navigable waters where navigation conditions require such reconstruction or alteration of bridges heretofore built in accordance with law. . . ." House Report No. 1447, August 2, 1939, 76th Cong. 1st Sess.

The regulations implementing the Truman-Hobbs Act establish a lengthy administrative procedure for determining whether a bridge is "an unreasonable obstruction *675 to navigation." *See* 33 C.F.R. § 116.01-116.55 (setting out complaint process, preliminary investigation, detailed investigation, public hearing, and administrative review). Ultimately, the Chief Officer of the Bridge Administration (the "Chief") performs a cost/benefit analysis to determine whether the benefits to navigation exceed the government's cost of altering the bridge. 33 C.F.R. § 116.30. If the benefits exceed the costs, then the Chief recommends that the Coast Guard issue an Order to Alter stating that the bridge unreasonably obstructs navigation. *Id.* Once the Coast Guard concludes that a bridge is an unreasonable obstruction to navigation, the bridge owner must: (1) submit plans and specifications for altering the bridge; (2) solicit and submit bids; and (3) request an Apportionment of Costs which outlines which costs will be borne by bridge owner and the United States government. *See* 33 U.S.C. §§ 514-516; 33 C.F.R. §§ 116.40, 116.45, 116.50.

Looking at the Truman-Hobbs Act as a whole, a § 512 finding that a bridge is an "unreasonable obstruction to navigation" is not a direct comment on the safety of the bridge. Instead, the Coast Guard labels a bridge an unreasonable obstruction in order to facilitate the funding process. Accordingly, we conclude that the Truman-Hobbs Act does not satisfy the first element of the *Pennsylvania* rule

because it was not drafted to protect marine safety, but to establish a procedure to provide government funds to assist bridge owners in altering their bridges.

The Truman-Hobbs Act also does not satisfy the other two prerequisites of the *Pennsylvania* rule as it does not impose a specific duty or prevent a specific sort of injury. Once the Coast Guard concludes that a bridge violates § 512, the bridge owner is required only to prepare a plan for altering the bridge. This "duty" is very different from a duty to maintain lights and signals on a bridge or to promptly open a draw. *See* 33 U.S.C. § 494 (requiring a bridge owner to maintain "such lights and other signals thereon as the Commandant of the Coast Guard shall prescribe" and to promptly open such draw upon reasonable signal for the passage of boats and other water craft). With respect to the latter duties, the application of the *Pennsylvania* rule is justified because a bridge owner greatly increases the risk of allision by failing to promptly open a draw or by neglecting to maintain the bridge's lights. Conversely, a bridge owner's failure to prepare a plan for altering a bridge will delay the funding process, but will not directly increase the risk of allision.

Also, the goal of the Truman-Hobbs Act was to decrease the cost of navigation by using government funds to alter bridges which unreasonably obstruct such navigation. Although the bridge alterations may reduce the amount of allisions, this is a collateral consequence and not a direct purpose of the Truman-Hobbs Act. To state it another way, the Truman-Hobbs Act was not designed to prevent any specific type of injury. Thus, any injury suffered in admiralty is not "of a nature that the [Truman-Hobbs Act] was intended to prevent." *Folkstone Mar. Ltd. v. CSX Corp.*, 64 F.3d 1037, 1047 (7th Cir.1995).

[3] In concluding that the district court incorrectly invoked the *Pennsylvania* rule, we further note that the

district court did not cite a single case in which a court applied the *Pennsylvania* rule solely because a bridge violated the Truman-Hobbs Act. In *Nassau County Bridge Authority v. Tug Dorothy McAllister,* 207 F.Supp. 167, 172 (E.D.N.Y.1962), the district court applied the *Pennsylvania* rule because the bridge tender violated 33 U.S.C. §§ 494 by failing to promptly open a draw for an *676 approaching ship. In *Folkstone Maritime, Limited v. CSX Corp.,* 64 F.3d 1037 (7th Cir.1995), the court applied the *Pennsylvania* rule because the bridge owner violated 33 U.S.C. § 491 which provides that "it is unlawful for a bridge to deviate from its plans and specifications for its construction . . . unless the modification of the bridge is previously submitted to and approved by the Secretary of Transportation." The *Folkstone* court concluded that the bridge owner violated § 491 by failing to abide by the Coast Guard's order to construct a draw which could be raised to 83 degrees. *Folkstone,* 64 F.3d at 1048-49. Unlike the present case, *Nassau* and *Folkstone* involve active negligence on the part of bridge owners.

Although these cases cited § 512, neither court explained how a violation of that particular statute served to invoke *Pennsylvania* rule.[2] Accordingly, we find that the district court did not present any authority to support its conclusion that a violation of the Truman-Hobbs Act invokes the *Pennsylvania* rule.

We will not invoke the *Pennsylvania* rule to punish a bridge owner who controls a lawful bridge. Under the Truman-Hobbs Act, a bridge labeled an unreasonable obstruction is still a *lawful* bridge. 33 U.S.C. § 511. In order

---

[2] The district court also cited *City of Boston v. S.S. Texaco Texas,* 773 F.2d 1396 (1st Cir.1985) to support its application of the *Pennsylvania* rule; however, the *City of Boston* case does not discuss the *Pennsylvania* rule so we will not discuss it here.

to obtain funding under the Truman-Hobbs Act, the bridge must be "lawful" and used as a railroad or a public highway. *Id.* To maintain a lawful bridge, bridge owners must abide by the laws and regulations governing bridges. The Clinton Bridge was built in 1907 in accordance with then-current Department of Transportation procedures and it currently complies with the Coast Guard's regulations. Appellees do not assert that Appellant caused this allision through active negligence; instead, they fault the bridge owner for failing to alter the Clinton Bridge to accommodate the ever-increasing size of commercial barges and tows. We will not employ the *Pennsylvania* rule to punish a bridge owner who maintains a lawful bridge, even though the Coast Guard has found such a bridge to be an unreasonable obstruction due to the barge industry's expansion of the size of its commercial vessels.

In sum, we find that the district court should not have relied on a violation of the Truman-Hobbs Act to invoke the *Pennsylvania* rule. Accordingly, the district court erred by concluding that a violation of § 512 invokes the *Pennsylvania* rule and shifts the burden of persuasion back to Appellant. Instead, the district court should have applied the *Oregon* presumption.

[4] We now address Appellees' assertion that we should affirm the district court's judgment because the Coast Guard's declaration that the bridge is an unreasonable obstruction to navigation rebuts the *Oregon* presumption and shifts the burden of proof back to the bridge owner. In order to affirm the district court's judgment, we would have to conclude, as a matter of law, that the Coast Guard's Order to Alter rebuts the *Oregon* presumption. Because we believe the trier of fact should determine whether the *Oregon* presumption is rebutted by the Coast Guard's Order to Alter, we cannot affirm the district court's legal conclusion that the *Oregon* rule does not apply.

Appellees rely on *I & M Rail Link, LLC v. Northstar Navigation, Inc.*, 198 F.3d 1012 (7th Cir.2000) to support their position that the Coast Guard's Order to Alter *677 rebuts the *Oregon* presumption and shifts the burden of proof back to the bridge owner. The Seventh Circuit case is strikingly similar to the case at bar as it arose from an allision between a large seagoing vessel and the Sabula Bridge, a century-old railroad bridge. *Id.* at 1013. Ten months prior to the allision, the Coast Guard had issued an Order to Alter finding that the Sabula Bridge was "an unreasonable obstruction to navigation." *Id.* at 1014. The district court applied the *Oregon* presumption and granted summary judgment against the defendant vessel. *Id.* Although the defendant "sought to rebut the *Oregon* presumption by arguing that the Sabula Bridge is an unreasonable obstruction to navigation," the district court decided to ignore the Coast Guard's Order to Alter because it was part of the Truman-Hobbs Act and therefore had no significance in a negligence action. *Id.* The Seventh Circuit disagreed.

Writing for the panel, Judge Easterbrook reversed the district court's grant of summary judgment and remanded the case for trial because the defendant presented sufficient evidence to raise a question of fact on the issue of negligence. Judge Easterbrook noted that the Coast Guard's Order to Alter was not an "unelaborated ukase," but a conclusion based on evidence that: (1) the Sabula Bridge repeatedly is struck; and (2) the bridge's outdated structure does not allow modern-day vessels to navigate easily through the bridge. *Id.* at 1015-16. Ultimately, Judge Easterbrook concluded that:

> If the Coast Guard may find the Sabula Bridge an unreasonable obstruction based on the cost and accident data, then so may the *trier of fact* in admiralty. . . . Findings in the Coast Guard's report are more than adequate to overcome *The Oregon's* presumption. . . .

> The trier of fact must give an answer without resort to presumptions. *Although the Coast Guard's findings may well be conclusive for some purposes . . . the question remains whether the shortcomings of the bridge caused this accident.*

Id. at 1016 (emphasis added) (citations omitted).

Appellees maintain that the *I & M Rail Link* case stands for the proposition that, as a matter of law, the Coast Guard's Order to Alter rebuts the *Oregon* presumption and thus the litigation should proceed on a level playing field. This view seems to be based on the single sentence "The trier of fact must give an answer without resort to presumptions." We, however, interpret the Seventh Circuit's opinion differently.

In our view, the *I & M Rail Link* case stands for the proposition that a defendant can attempt to *rebut* the *Oregon* presumption by presenting evidence that the Coast Guard labeled the bridge an "unreasonable obstruction to navigation." Under *I & M Rail Link,* a Coast Guard Order to Alter is not conclusive evidence of negligence, but merely another piece of evidence which the *trier of fact* may consider in determining fault in a negligence action. *See I & M Rail Link,* 198 F.3d at 1016 ("Although the Coast Guard's findings may well be conclusive for some purposes . . . the question remains whether the shortcomings of the bridge cause this accident."). Our interpretation is shared by the lower court which, on remand, tried the case in accordance with the Seventh Circuit's opinion. *See I & M Rail Link v. Northstar Navigation,* No. 98-C-50359, 2001 WL 460028, at *4 (N.D.Ill. April 27, 2001) ("It is true the Seventh Circuit referred to the previous accidents at the Sabula Bridge included in the Coast Guard's reports, and said the trier of fact may find the Sabula Bridge an unreasonable obstruction based on the *678 Coast Guard's cost and accident data. . . . *But it did so in the context of explaining its*

holding on a rather narrow issue: that this evidence could be used to rebut the presumption of The Oregon. . . .") (emphasis added). To the extent that the *I & M Rail Link* case can be interpreted to hold that a Coast Guard's Order to Alter rebuts and overcomes the *Oregon* presumption, as a matter of law, we respectfully disagree.

Our interpretation of *I & M Rail Link* is in accordance with longstanding precedent which allows a moving vessel to rebut the *Oregon* presumption by presenting evidence that the bridge was an unreasonable obstruction to navigation. *Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co.*, 259 F. 166, 168 (4th Cir.1919). In *Wilmington Ry. Bridge Co.*, the Fourth Circuit stated that the *Oregon* presumption may be rebutted:

> by proof that the location of the stationary vessel, *the obstruction of navigation by the bridge,* or other causes had brought the moving vessel into an emergency not to be reasonably foreseen, and that the course taken by the navigator in the emergency was such as might well have been taken by a prudent and skillful navigator.

Id. (emphasis added).

In its own words, the district court stated that "[t]he single *legal* question they ask this court to answer is: Does the Truman-Hobbs Act finding that the bridge is "an unreasonable obstruction to navigation" render inapplicable any presumption that negligence of the barge crew was the cause of a collision between a moving vessel and a stationary bridge?" *Union Pac.*, No. 3-99-CV- 80185 at 1. To state it another way, the district court was considering whether, as a matter of law, a Truman-Hobbs Act finding trumps the *Oregon* presumption. We conclude that a Truman-Hobbs Act finding does not render inapplicable the *Oregon* rule and therefore reverse the district court's conclusion to the contrary in this case.

In remanding we recognize that Appellees have produced evidence regarding the "obstructive character" of the Clinton Bridge. Appellees note that the Coast Guard's Detailed Report: (1) documents more than 300 allisions between the Clinton Bridge and various vessels in a ten year period; (2) emphasizes the fact that the Clinton Bridge is out of date and does not permit the smooth navigation of modern-day commercial vessels; and (3) criticizes the poor position of the Clinton Bridge.[3] The parties, however, did not ask the district court to consider whether Appellees presented sufficient evidence to rebut the *Oregon* presumption; thus, that question is not currently before this Court. Instead, the parties posed the single legal question of whether a Truman-Hobbs Act finding that a bridge is an unreasonable obstruction to navigation renders inapplicable the *Oregon* presumption. We conclude that the answer to that particular question is "no."

Accordingly, we find that the district court erred by concluding as a matter of law that the *Oregon* presumption does not apply. *See Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co.*, 259 F. 166, 168 (4th Cir.1919). The opinion of the district court is reversed.

B. Federal Rule of Evidence 803(8)(C)

Appellant also asserts that the district court erred by admitting the Coast *679 Guard's Order to Alter into evidence.[4] We review the district court's evidentiary rulings

---

[3] We note that the Coast Guard's detailed report was not included in the parties' Stipulated Facts.

[4] Although Appellant seems to oppose the district court's admission of other documents, we find that the district court's opinion relates only to the February 28, 1996 Order to Alter. *See Union*

(continued...)

"under the abuse of discretion standard, according the district court substantial deference." *Gagnon v. Sprint Corp.*, 284 F.3d 839, 856 (8th Cir.2002) (citing *Shelton v. Consumer Prods. Safety Comm'n*, 277 F.3d 998, 1009 (8th Cir. 2002)). In its opinion, the district court specifically stated that the "[t]he Coast Guard findings are admissible under Federal Rules of Evidence 402 and 803(8)(C)." *Union Pac. R.R. Co. v. Kirby Inland Marine et. al*, No. 3-99-CV-80185, slip op. at 4, 2001 WL 1689710 (S.D.Iowa Aug. 13, 2001). The court further concluded that the findings are "trustworthy" because "they are based on factual investigation, and they are directly relevant to the issues here." *Id.*

Rule 803(8)(C) of the Federal Rules of Evidence defines the "public records and reports" which are not excludable under the hearsay rule. Rule 803(8)(C) specifically excludes "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170, 109 S.Ct. 439, 450, 102 L.Ed.2d 445 (1988), the Supreme Court specifically concluded that opinions, conclusions, and findings of fact are admissible under Rule 803(8)(C). The Court further stated that "[a]s long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report." *Id.*

[5] The party opposing the admission of the report has the burden of proving the report's untrustworthiness. *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300, 1304 (5th Cir.1991). When considering whether a report is trustworthy, the court should not consider whether the report is

---

[4] (...continued)
Pac. R.R. Co. v. Kirby Inland Marine et al., No. 3-99-CV-80185, judgment (S.D.Iowa Aug. 13, 2001).

credible, but rather should consider whether the report is reliable. *Id.* at 1306-07. "The Rule 803 trustworthiness requirement, therefore, means that the trial court is to determine primarily whether the report was compiled or prepared in a way that indicates that its conclusions can be relied upon." *Id.* at 1307.

[6] We find that the district court did not abuse its discretion by concluding that the Coast Guard's Order to Alter is admissible pursuant to Rule 803(8)(C). The Coast Guard's investigation into the Clinton Bridge was mandated by law. *See* 33 C.F.R. § 116.10 ("Upon receipt of a written complaint, the District Commander will review the complaint to determine if . . . the complaint is justified and whether a Preliminary Investigation is warranted."). As was discussed above, the Truman-Hobbs Act established a thorough review process to determine whether a bridge should be altered because it is an unreasonable obstruction to navigation. This process includes a preliminary investigation, detailed investigation, public hearing, and an administrative review. *See* 33 C.F.R. § § 116.01-116.55. The fact that Coast Guard investigators relied on hearsay evidence to reach their conclusions does not mean that the preparation of the report was untrustworthy. *Moss,* 933 F.2d at 1309.

In sum, Appellant has not presented any evidence that the Coast Guard's Order to *680 Alter contained findings and conclusions which were untrustworthy. Accordingly, we conclude that the district court did not abuse its discretion by admitting the document, and we therefore affirm the district court's conclusion to admit the Order to Alter into evidence.

III. Conclusion

For the foregoing reasons, the district court's conclusions of law and final judgment are reversed in part and affirmed in part.

APPENDIX B

Not Reported in F.Supp.2d
2001 A.M.C. 2857
(Cite as: 2001 WL 1689710 (S.D.Iowa))

United States District Court, S.D. Iowa,
Davenport Division.

UNION PACIFIC RAILROAD CO., Plaintiff,

v.

KIRBY INLAND MARINE, INC. OF MISSISSIPPI
a/k/a Brent Transportation Company, in
personam and the M/V Miss Dixie,
its engines, tackle, fixtures and
appurtenances, etc., in rem, Defendant.

No. 3-99-CV-80185.

Aug. 13, 2001.

CONCLUSIONS OF LAW BASED ON A STIPULATED RECORD

WOLLE, J.

*1 Plaintiff Union Pacific Railroad Co. (Union Pacific) owns the Clinton Bridge. Union Pacific filed this admiralty and maritime suit, claiming money damages from defendant Kirby Inland Marine, Inc. (Kirby) on the ground that its vessel and/or tow struck the bridge, causing damage.

The parties stipulated to facts and on July 17, 2001, presented argument by telephone conference call. The single legal question they ask this court to answer is: Does the Truman-Hobbs Act finding that the bridge is "an unreasonable obstruction to navigation" render inapplicable any presumption that negligence of the barge crew was the cause of a collision between a moving vessel and a stationary bridge?

The court concludes the presumption does not apply. A Coast Guard Truman-Hobbs Order to Alter issued prior to the collision found the bridge to be an unreasonable obstruction to navigation, thereby eliminating any presumption of crew negligence that may otherwise have existed.

Findings of fact. The court adopts and incorporates herein the parties' stipulated facts filed May 15, 2001.

Conclusions of law.

1. "As in other civil cases, the plaintiff has the burden of proving by a preponderance of the evidence that the defendant vessel was negligent and that this negligence was a proximate cause of the injury." *Illinois Constructors Corp. v. Logan Transp. Inc.*, 715 F.Supp. 872, 879 (N.D.Ill.1989). Plaintiff can satisfy this initial burden and establish a prima facie case of negligence by invoking the *Oregon* rule. *Id.*

2. The *Oregon* rule states that a moving vessel is presumptively at fault in a collision where the moving vessel hits a stationary object. *The Oregon,* 158 U.S. 186 (1895). The Supreme Court stated that hitting a stationary object raised a presumption of fault on the part of the moving vessel, and "the burden of proof is upon [the moving vessel] to exonerate herself from liability." *Id.* at 192-193. Under *The Oregon* presumption, the burden of proof shifts from the plaintiff to the defendant vessel.

3. Here, defendant's moving vessel struck the stationary Clinton Bridge. Union Pacific can therefore invoke the *Oregon* presumption and shift the burden of proof to Kirby. Kirby can overcome this presumption of fault only by proving that it actually was without fault, the stationary object was at fault, or that the collision was inevitable. *Bunge Corp. v. M/V Furness Bridge,* 558 F.2d 790, 795 (5th Cir.1977) (citing *Carr v. Hermosa Amusement Corp.,* 137 F.2d 983, 985 (9th Cir.1943)).

4. On February 28, 1996, prior to the collision, the Commandant of the U.S. Coast Guard issued an Order to Alter that states the Clinton Bridge "is an unreasonable obstruction to navigation." This is in direct violation of 33 U.S.C. § 512, which states:

> No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States.

5. Where any party violates a statutory or regulatory rule designed to prevent collisions, that party has committed per se negligence, and under the *Pennsylvania* rule, has the burden of proving that its statutory fault was not a contributing cause of the accident. *The Pennsylvania,* 86 U.S. 125, 136 (1873).

*2 6. Courts have held that the *Pennsylvania* rule applies to bridges. *Folkstone Maritime, Ltd. v. CSX Corp.,* 64 F.3d 1037 (7th Cir.1995); *City of Boston v. S.S. Texaco Tex.,* 773 F.2d 1396, 1397-98 (1st Cir.1985); *Nassau County Bridge Authority v. Tug Dorothy McAllister,* 207 F.Supp. 167, 171 (D.C.N.Y.1962).

7. Here, the normal presumption of fault that attaches to the vessel under the *Oregon* rule is shifted back to the structure owner under the *Pennsylvania* rule. *See Illinois Constructors,* 715 F.Supp. at 879 (citing *United States v. Norfolk-Berkley Bridge Corp.,* 29 F.2d 115, 125 (E.D.Va. 1928)).

8. The bridge owner must prove that its failure to comply with the statutory or regulatory requirements could not have been a factor that contributed to the injury. *See Complaint of Wasson,* 495 F.2d 571, 579-80 (7th Cir.1974).

9. The Coast Guard findings are admissible under Federal Rules of Evidence 402 and 803(8)(C). They are trustworthy, they are based on factual investigation, and they are directly relevant to the issues here.

10. The Supreme Court concluded in *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153 (1988), that Rule 803(8)(C) did not preclude as inadmissible investigative JAG reports on a U.S. Navy plane crash, so long as they met two criteria. All statements in such a report must be based on factual investigation, and any portion of the report admitted must be sufficiently trustworthy. *Id.* at 167. In determining whether a report is sufficiently trustworthy, the Supreme Court cited with approval the use of four non-exhaustive factors:

> (1) the timeliness of the investigation; (2) the investigator's skill and experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation.

Id. at 168 n. 11. The party opposing the introduction of such reports bears the burden of coming forward with enough "negative factors" to persuade a court that a report should not be admitted. *See Complaint of Nautilus Motor Tanker Co., Ltd.,* 85 F.3d 105, 113 (3rd Cir.1996) (citing *Beech* at 167). Union Pacific has failed to persuade this court that the Coast Guard's findings should not be admitted.

Summary. The *Oregon* presumption does not apply under the facts of this case. Admissible is the Coast Guard order issued February 28, 1996. It eliminates any presumption of crew negligence that may otherwise have existed.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 01-3334	)	
	)	
Union Pacific Railroad,	)	
	)	
Appellant,	)	Order Denying Petition
v.	)	for Rehearing and for
	)	Rehearing En Banc
	)	
Kirby Inland Marine Inc.	)	
of Mississippi, etc., et al.,	)	
	)	
Appellees.	)	

The appellee's petition for rehearing en banc is denied. The appellant's petition for rehearing by the panel is also denied.

(5128-010199)

August 15, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit